

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARENCE JAMES JONES,

Defendant-Appellant.

UNPUBLISHED

March 21, 2006

No. 258631

Wayne Circuit Court

LC No. 04-004964-01

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 30 days to four years for the felonious assault conviction, and 30 days to five years for the felon-in-possession conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. FACTS

At trial, Robert Dickerson testified that defendant fired a semiautomatic handgun at his car as Dickerson was driving southbound on Coventry Street in Detroit, on September 8, 2003. Dickerson found a bullet hole in the floorboard of the rear driver's side area of the car and a bullet lodged in a Game Boy that he had in the car. Dickerson testified that he had previously been involved in a relationship with defendant's sister, Annette Twilley, and that defendant had been hostile and threatening to him since the relationship ended in June 2003.

Defendant presented his friend, Michael Bening, and his son, Timothy Davis, as alibi witnesses. Bening and Davis both testified that they were in defendant's home with defendant on the afternoon of the shooting. Defendant testified that he was at home that entire day because of back pain.

The trial court found that Dickerson and the other prosecution witnesses were credible, and that defendant and his alibi witnesses were not credible. The court found defendant guilty of felonious assault, but acquitted him of additional alternative counts of assault with intent to commit murder and assault with intent to commit great bodily harm less than murder. It also found him guilty of felon in possession of a firearm and felony-firearm.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues on his appeal that the evidence was insufficient to support his convictions.

A. Standard of Review

We review a challenge to the sufficiency of the evidence at a bench trial de novo. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002). We must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that all elements of the offenses were proven beyond a reasonable doubt. *People v Bulls*, 262 Mich App 618, 623; 687 NW2d 159 (2004).

B. Analysis

Defendant does not argue that the prosecution's witnesses failed to establish factual support for the elements of the offenses. Rather, he argues that the trial court erred in finding that the prosecution's witnesses were credible, and that the defense witnesses were not credible. The credibility of the witnesses was for the trial court, as the trier of fact, to resolve and this Court will not resolve it anew. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Here, Robert Dickerson identified defendant as the person who fired a semiautomatic handgun at his car as Dickerson was driving. Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant also raises a claim of ineffective assistance of counsel.

A. Standard of Review

The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the lower court are reviewed for clear error, and questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

To establish ineffective assistance of counsel, a defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for his attorney's error, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001); . *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)

Defendant argues that trial counsel should have moved to dismiss the charges on the ground that he was prejudiced by delay between the offenses and his arrest. The charged offenses were committed on September 8, 2003, an arrest warrant was issued on November 6, 2003, and defendant was arrested in March 2004. Defendant argues that the six-month period of

delay was unjustified, and violated his right to due process. However, his attorney failed to raise the argument in the trial court.

A challenge based on prearrest delay implicates constitutional due process rights. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). Before dismissal may be granted because of prearrest delay, a defendant must demonstrate actual and substantial prejudice resulting from the delay. *Id.*; *People v Adams*, 232 Mich App 128, 134; 591 NW2d 44 (1998); *People v Bisard*, 114 Mich App 784, 791; 319 NW2d 670 (1982). Once a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted. *Adams, supra*. Prejudice is substantial if the delay meaningfully impaired the defendant's ability to defend against the charges to an extent that the disposition of the criminal proceeding is likely affected. *People v Cain*, 238 Mich App 95, 108-109; 605 NW2d 28 (1999).

Here, defendant's only allegation of prejudice is that his witnesses had difficulty recalling the days of the week that certain events occurred. But as this Court explained in *Crear, supra* at 166, "[a]lleged imperfections of a witness' memory are generally insufficient to establish actual and substantial prejudice." Moreover, the record discloses that defendant's alibi witnesses testified unequivocally about being at defendant's house on September 8, 2003. The trial court acknowledged that Davis was "very vehement" about that date, and that Bening indicated that he had a "very definite recollection" of being at defendant's house on that date. The trial court ultimately rejected the alibi testimony because it found that defendant's witnesses were not credible. Because the record does not demonstrate actual and substantial prejudice resulting from the six-month delay before defendant's arrest, any motion to dismiss based on prearrest delay would have been legally and factually meritless. Failure to advocate a meritless position does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio